Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

WARDE H. ERWIN propria persona,

Petitioner

v.

THE STATE OF OREGON by and through THE HONORABLE JOHN KITZHABER, Governor of the State of Oregon, THE OREGON STATE BAR and its BOARD OF GOVERNORS

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED FOR REVIEW

1) Has the Court of Appeals for the Ninth Circuit decided an important federal question in a way that conflicts with relevant decisions of this court? *Verizon v. Public Service Commission of Maryland*, 535 U.S. _____, May 20, 2002 and *Ex Parte Young*, 209 U.S.123 (1908).

2) Has the Court of Appeals by affirming the decision of the District Court which dismissed the Plaintiff's complaint without hearing for lack of subject matter jurisdiction thereby violated the provisions of the United States Constitution when the complaint requested only a declaratory judgment concerning the operation and enforcement of the Oregon State Bar Lawyer's Professional Liability Fund as affecting the members of the Oregon State Bar being automatically disbarred and prevented from practicing their profession for failure to pay an assessment levied by the Board of Governors without right to a hearing (Oregon State Bar Lawyer's Bar Professional Liability Fund, O.R.S. 9.080 and O.R.S. 9.200)?

The Lawyer's Professional Liability Fund law was impliedly repealed y Chapter 752, *Oregon Revised Statutes* in 1987, but the Bar is enforcing the repealed Fund law. (The Professional Liability Fund's law 1987, Chapter 752 *Oregon Revised Statutes* was the repealing statute.)

3) Has the Court of Appeals for the Ninth Circuit, by affirmance of a District Court dismissal for breach of subject-matter jurisdiction failed to apply the mandate of Title 28, Section 2201 U.S.C.A. which requires the entry of a declaration whether favorable or otherwise? *Advance Resorts of America v. City of Wheeler*, 141 Or. App.166,180, 917 P.2d 61, *rev. den.* 3224 Or. 211 (1996) and *City of Portland v. Cook*, 170 Or. 245, 253, 12 P.3rd 70 (2000).

4) Are the constitutional rights of Oregon lawyers (members of the integrated Oregon State Bar) practicing their profession in the State of Oregon being constitutionally (Federal) discriminated against by being subjected to the only plan of mandatory malpractice insurance adopted by

any state of the Union, all other states examining the same or similar plans having rejected the same?

5) Under what authority may a federal Court of Appeals merely affirm a Federal District Court of a declaratory judgment cause and then order that the decision may not be published?

a) Does the Bar and public have a right to be informed?

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BASIS OF JURISDICTION

This case is brought under authority of Title 28 , Section 2201 UNITED STATES CODE (App. page 5)
Date of document to be reviewed: July 30, 2002
Date and terms of extension of time: November 27, 2002
Statutory provision conferring jurisdiction on Supreme Court:
Title 28, Sections 2201 -2202 United States Code

CONSTITUTION, RULES, STATUTES INVOLVED

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STATEMENT OF THE CASE

The only question before this court is :

"Subject matter jurisdiction."

The subject matter of plaintiff's complaint was stated under the heading of jurisdiction as follows:

> This action is based upon Title 28 U.S.C. 2201 (Declaratory Judgment) and presents a question of the validity of legislation by the Oregon State Legislature under Amendments V and XIV of the CONSTITUTION OF THE UNITED STATES OF AMERICA, as affecting the plaintiff and all members of the Oregon State Bar as a class in their relation to the defendants in the administration of the Oregon State Bar Professional Liability Fund.

The United States District Court for the State of Oregon dismissed plaintiff's complaint although it was clearly a "Declaratory" procedure to determine the rights, duties, and relationship between the members of the Oregon State Bar and the Oregon State Bar as an entity together with the Bar's Board of Governors (as its statutory Executive Administrator) in regard to the Bar's administration of The Oregon State Bar Professional Liability Fund and failed to enter a declaration as required. It totally ignored O.R.S. Chapter 752 without even mention, and failed to determine plaintiff's motion for summary judgment based upon the Supreme Court Case of *Verizon Maryland v. Public Service Commission of Maryland et al*, 535 U.S. ____ May 20, 2002 .

ARGUMENT

Reasons for the writ- Considerations concerning review:

Plaintiff filed in the Federal District for the State of Oregon a Complaint and did so in behalf of all the members of the Oregon State Bar as a class as well as personally as a member of the class on the 6th day of February 2001.

Under the heading "Jurisdiction" the complaint stated:

> This action is based upon Title 28 U.S.C. 2201 (declaratory judgment)and presents a question of the validity of legislation by the Oregon State Legislature under amendments V and XIV of the Constitution of the United States as affecting the plaintiff and all members of the Oregon State Bar as a class in their relation to the defendants in the administration of the "Oregon State Bar Professional Liability Fund." (Title 28,# 2201and 2202. (App. page 32).

The Federal District Court dismissed the case without hearing (although hearing was requested) and without making a declaration of any kind as follows:

> " Civil No. 01-177 FR
> JUDGMENT
>
> IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendants and against the plaintiff.
>
> Dated this 23rd day of July 2001.
> (sig) Helen J. Frey
> United States District Judge"

an order dated the same date stated:

"Civil No. 01-177 FR.
ORDER

IT IS HEREBY ORDERED that:

1) defendant Oregon State Bar's motion for summary judgment (#13) is GRANTED
2) defendant State of Oregon's motion to dismiss (#17) is GRANTED.
3) plaintiff's motion for hearing to present evidence (#28)is DENIED, and
4) Plaintiff's motion to strike (#32) is DENIED.

Dated this 23rd day of July 2001.
(sig)) Helen J. Frey
United States District Judge"

The numbers in brackets refer to the District Court Civil Docket. (App. page 33).

An opinion of the Federal District Court was filed on the same date as the Order (see App. page 40) Docket (#34).

The opinion made an analysis of the contentions made in support of defendants' motion to dismiss for lack of subject matter jurisdiction. The contentions were three in number.:

1) The Federal Court lacks subject matter jurisdiction because Erwin's petition is barred by the Eleventh Amendment of the United States Constitution.
2) Issue and claims preclusion and the Rooker-Feldman Doctrine prevented the plaintiff from bringing an action in the Federal District Court because a similar action in the State court of Oregon found:

> 6 The suspension provision of O.R.S. 9.200 for non-payment of P.L.F. assessments is not violative of constitutional 'due process' requirements

> as alleged in Count 3 of plaintiff's second amended complaint.
>
> The suspension provision of ORS 9.200 is not an unconstitutional "taking" of property without compensation.
>
> 8- O.R.S. 9.080 and O.R.S 9.200 do not constitute an unlawful or unconstitutional delegation of legislative authority.

The opinion stated:

> To the extent that Erwin seeks to appeal to this court from the state Court action such an appeal is not proper and is barred by Rooker-Feldman doctrine which bars the lower Federal court from exercising appellate jurisdiction over a state court action even when the challenge involves Federal Constitutional issues. See *Worldwide Church of God v McNair*, 805 F.2d 888, 890-91 (9th Circ. 1986).

Not a single one of the foregoing were proper findings of fact. Each was a pure conclusion of law.

The Plaintiff appealed the judgment of the District Court to the Court of Appeals for the Ninth Circuit (See Court of Appeals Docket App. page 51).

The mistaken action of the District Court as well as the Court of Appeals was the apparent inability to distinguish between a claim for damages and a petition for declaratory judgment, pointing out that the defendants and the court in order to avoid the necessity of preparing and entering a Declaration of Rights between the parties had falsified the allegations of plaintiff's complaint to state that plaintiff sought damages (an absolute falsehood) but labeled by the court as being " unpersuasive") (see MEMORANDUM App. page 82).

Plaintiff had never at any time directly or indirectly requested a claim for damages . He sought nothing but a declaration of rights in any and all proceedings in any and all courts and had pointed out that dismissal of a declaratory judgment proceeding was an impermissible determination and was a nullity in fact. The Court of Appeals has apparently merely affirmed the District Court decision.

Both courts have apparently and intentionally refused to consider the effect that a subsequently adopted statute would have on the statute under which the bar was operating as to the rights of the 10000 plus members of the Oregon State Bar and merely ignored the problem without comment. (O.R.S. Chapter 752 (1983) as affecting O.R.S. 9.080 and O.R.S. 9.200)(1977).

The cases cited to the Court as to the propriety of a "Dismissal" as determining a declaratory judgment proceeding were as follows:

A proceeding for a declaratory judgment is not a "claim," and the parties are not considered "adversary."

> When a plaintiff seeks solely declaratory relief, the weight of authority does not view him as seeking to enforce a claim against defendant, instead he is seen as merely requesting a judicial declaration as to the existence and nature of a relation between himself and defendant – accordingly regardless of the outcome, the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action." *O'Conner v. Zelden*,134 Or. App.444-447, 895 P.2d 809, (1995).

> Since the complaint stated a justiciable controversy, the demurrers should have been overruled and after filing an answer – a decree containing a declaration of rights should have been entered." *Cabel v. Cottage Grove, et al*, 170 Or. 256, 262, 130 P.2d 1013 (1943).

A claim for declaratory judgment may be dismissed only if there is no justiciable controversy." *Johnson v. Miller*, 113 Or. App. 98, 100, 831 P.2d 71 (1992); *Reynolds v. State Board*, 80 Or. App. 428 ,441-42: 722 P.2d 739 (1986).

"If there is a justiciable controversy, the court MUST dispose of the matter by a judgment containing a declaration as to the matter in dispute." *Advance Resorts of America v. The City of Wheeler*, 141 Or. App. 166,180; 917 P.2d 61 (1996).

_ - — action for declaratory judgment must not be dismissed for failure to state a cause or claim; if complaint presents justiciable controversy, motion to dismiss should be denied." *Clark v. City of Albany*, 142 Or. App. 207; 921 P.2d 1094 (1997).

Dismissal of Claim for Declaratory Judgment is inappropriate where claim presents "justiciable controversy." *Randolph v. State by and through Oregon Dept. of Corrections*, 139 Or. App. 79, 910 P.2d 1171, (1996).

The proper disposition of declaratory relief claims is not to dismiss them but to declare the parties' rights." *Sims v. Belshaw Café*, 165 Or. App.180, 997 P.2d 201 (2000).

However, Plaintiff contended that all of the findings and conclusions were erroneous not only as contended by Plaintiff's briefs but as determined by the Supreme Court of the United States on May 20, 2002 in the case of *Verizon Maryland v. Public Service Commission* (herein *Verizon*) because that case discussed precisely the fact that the Courts had been misinterpreting the exact same law as the Federal District Court and the Court of Appeals had done in this case holding that the District Court did not have subject matter

jurisdiction of a case brought under Title 28, Section 2201 and 2202 U.S.C. (App. page 32).

On the day following the *Verizon* determination a full copy of the decision was forwarded to the Ninth Circuit (May 21, 2002), (App. page 70) (Served on May 21 but filed on May 28, 2002.) The filing was accompanied by a letter designating *Verizon* as "Additional authority . . ." (App. page 70)

After reviewing the reported case of *Verizon* more thoroughly, plaintiff became convinced that all three of the District Court theories upon which it relied for its conclusion that it did not have subject matter jurisdiction had been effectively overruled by *Verizon*, and Plaintiff prepared, served, and filed a motion for summary judgment requesting a remand and for a hearing on the merits. (See App. page 51) and Docket Sheet of the Ninth Circuit court as having been served on July 26, 2002 and filed on July 29, 2002.

No action was or has been taken either as to the additional authority or the Motion for Summary Judgment.

Apparently it was determined that the Plaintiff was correct in his assumption that the *Verizon* case and the *Young* case had conclusively emasculated all three theories upon which the District Court had relied for support of its conclusion that it did not have subject matter jurisdiction of Plaintiff's case and on the contrary did determine that the District Court did in fact have subject matter jurisdiction.

On or about the 2nd day of August, Plaintiff received a copy of a MEMORANDUM upon which appeared both a single and a double asterisk, the former of which advised that F.R.A.P. Rule 36-3 provided that the Memorandum may not be cited as authority. (App. page 82), and the latter of which advised that the panel had unanimously found that the case was suitable for determination without oral argument. The double asterisk footnote referenced F.R.A.P. Rule 36-3 which states as follows:

CIRCUIT RULE 36-3. CITATION OF UNPUBLISHED DISPOSITIONS OR ORDERS

(a) Not precedent. Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata and collateral estoppel.

(b) Citation. Unpublished dispositions and orders of this court may not be cited to or by the courts of this Circuit except in the following circumstances.

(i) They may be cited to this court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.

(ii) They may be cited to this court or by any other courts in this circuit for factual purposes such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorney's fees, or the existence of a related case.

(iii) They may be cited to this court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4 or in a petition for panel rehearing or rehearing en banc in order to demonstrate the existence of a conflict among opinions, dispositions or orders.

(c) Attach copy. A copy of any unpublished disposition or order must be attached to the document.

CIRCUIT ADVISORY COMMITTEE
NOTE TO RULE 36-3

Circuit Rule 36-3 has been adopted for a limited 30-month period, beginning July 1, 2000 and ending December 31, 2002. Litigants are invited to submit comments regarding the rule to the clerk during the first 24 months of the trial period. After the rule has been in effect for 24 months, the Advisory Committee on Rules will study and report to the Court on the frequency with which unpublished dispositions are cited to the court and on any problems or concerns associated with this rule. The Advisory Committee will also issue a recommendation on whether the rule should be made permanent. Unless, by December 31, 2002, the court votes affirmatively to extend the rule, it will automatically expire on December 31, 2002, and the former version of Circuit Rule 36-3 prohibiting citations under all circumstances will be reinstated. (New Rule 7/1/2000). Adopted effective July 1, 2000.

A letter disposition of a "judgment" was apparently sent to the District Court Clerk but there was no "JUDGMENT"entered insofar as plaintiff was informed. Plaintiff's motion for summary judgment was still pending before the motion panel.

The decision of a merit panel appointed without notice stated: "Erwin's contentions regarding a 'manufactured' theory between the District court and defendant and the existence of a 'justiciable controversy are "unpersuasive."

The "manufactured" theory refers to the absolutely false premise created by defendants and "parroted" by the court that Erwin's complaint sought a money judgment. The justiciable controversy was admitted by defendants. Each was an absolute fact and "persuasion" of the court was not

sought. It would seem apparent that the courts have determined that in the event that they face an absolutely incontrovertible proposition of law, the way to prevent having to determine the presented matter is to totally ignore its existence thereby preventing an appeal.

On the 23rd day of September, 2002, Plaintiff wrote to the Ninth Circuit Court clerk and served the parties with a copy in which the convoluted procedure had placed the Plaintiff in a difficult position and that any judgment, if any had ever been issued, should be published since it involves well over 10000 Oregon lawyers, all citizens of the United States. (see copy App. page 55).

No response!

ERWIN and *VERIZON* COMPARED SUBJECT MATTER JURISDICTION

As hereinabove stated, the only question before this court is "subject matter jurisdiction."

The U.S. District Court for the District of Oregon dismissed plaintiff's complaint which requested a declaratory judgment determining the rights, duties, and relationship of the members of the Oregon State Bar and the Oregon State Bar as an entity and its Board of governors as its statutory administrator in regard to the Bar's Administration of "THE OREGON STATE BAR PROFESSIONAL LIABILITY FUND" as affected by the United States Constitution.

The rights, duties, and obligations concerning which the Plaintiff personally and in behalf of the more than ten thousand lawyers engaged in the private practice of law in the state of Oregon involved only the provisions of the Federal Declaration of Judgments Act (Title 28, Sections 2201 and 2202). The complaint was limited to the claimed violations by the defendant Bar of the protections provided by the terms of the Fifth and Fourteenth amendments to the Constitution of the United States of America.

The District Court's dismissal did not discuss and in fact refused to hear or determine the merits of Plaintiff's claim either as to law or facts.

The dismissal was based entirely on the verbatim adoption of defendants' motions to dismiss and for summary judgment. The motions to dismiss were based upon "lack of subject matter jurisdiction." (App. page 46-47).

The "subject matter jurisdiction" claimed to be lacking was based entirely on three procedural theories none of which had anything to do with the subject matter of plaintiff's complaint.

The theories were:

1) The complaint was in effect an appeal from a lower court decision and was prevented by the Rooker-Feldman Doctrine.

2) The complaint was a claim for damages prevented by the Eleventh Amendment to the United States Constitution which prevented actions by a citizen of state against a state of the United States.

3) The complaint claim was prevented by the Doctrine of "claims preclusion."

The subject matter of Plaintiff's complaint was under the heading of "JURISDICTION" as follows:

> This action is based upon Title 28, Section 2201U.S.C. (Declaratory Judgment) and presents a question of the validity of legislation by the Oregon State Legislature under amendments V and XIV of the Constitution of the United States of America as affecting the plaintiff and all members of the Oregon State Bar as a class in their relation to the defendants in the administration of "The Oregon State Bar Professional Liability Fund."

In connection with their motions to dismiss, the defendants manufactured a totally false theory that Plaintiff was asserting a claim for damages against the defendants

and so advised the court who accepted that false statement as though true.

The representation to the court was a total fabrication and 100% untrue. But it was apparently accepted by the Court of Appeals since the panel characterized the falsity as "unpersuasive," thereby accepting its falsity. (See Memorandum App. page 82).

The Memorandum, the affirmance, the whatever else except not a "judgment" merely affirmed the decision of the District Court although there was no valid judgment of that court to affirm the so-called judgment stating as follows:

> "IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendants and against the plaintiff.
>
> "DATED this 23 day of July, 2001.
> (sig) Helen J. Frye
> United States District Judge"

That is all that the Court of Appeals therefor affirmed. There being no Declaration and no Dismissal.

On May 20, 2002 the answer seemed to be providentially provided by the Supreme Court of the U.S. in deciding the case of *Verizon Maryland v. Public Service Commission of Maryland, et. al.* on writs of Certiorari to Fourth Circuit Court of Appeals. The decision stated the questions presented as follows:

> "These cases present the question of whether or not the Federal Courts have jurisdiction over a telecommunication carrier's claim that the order of a state utility commission requiring reciprocal compensation for telephone calls to Internet service providers violates Federal Law."

Verizon negotiated an agreement with competitors including M.C.I. "WorldCom." The Maryland Service

Committee affirmed the agreement. Verizon notified MCI that it would no longer pay reciprocal compensation for certain calls made by Verizon customers to the local access numbers of internet service providers including WorldCom.

WorldCom filed a complaint with the commission which found in favor of WorldCom. Verizon filed a new complaint with the Commission as a result of an F CC ruling restating Verizon's position. The Commission rejected Verizon's consternation and Verizon then filed an action in the Federal District Court for Maryland citing 47 U.S.C. 252 (e) (6) and 28 U.S.C. 1331 as a basis for jurisdiction, naming the commission, its members in their official capacities, World Com, and other competing LECs seeking declaratory and injunctive relief from the commission's order that Verizon must pay reciprocal compensation to WorldCom.

The District Court of Maryland dismissed the action and a divided panel of the Court of Appeals for the Fourth Cir. D.C. affirmed 240 F.3rd279 (2001). 4th Circ. D.C. held that the commission had not waived immunity (11th amendment) and that *ex parte Young* 209 U.S. 123 (1908) does not permit suit against individuals in their official capacities.

Fourth Circ. D.C. then held that neither 47 U.S.C. (e) (6) nor 28 U.S.C. 1331 provided a basis for jurisdiction over Verizon's claims against the private defendants.

Both Verizon and the United States (an intervener) petitioned the U.S. Supreme Court for review of the four questions resolved by 4th Circ. DC.

The Supreme Court granted certiorari on the remaining three questions. (534 U.S. 1072) (2001).

WorldCom, Verizon, and the U.S. contended that 47 U.S.C. 252 (e) (6) and 28 U.S.C.1331 independently granted federal courts subject matter jurisdiction to determine whether the Commission's order requiring the Verizon pay WorldCom reciprocal compensation for I.S.P. bound calls violated the 1996 act.

The Supreme Court agreed that even if Section 252 (e)(6) does not "confer" jurisdiction, it at least does not "divest" the

District Courts of their authority under 28 U.S.C.1331. (App. page 60)

28 U.S.C. 1331 provides:

> "FEDERAL QUESTION
> The District Courts shall have original jurisdiction of all civil actions arising under the constitution laws or treaties of the United States".

The principal purpose of the grant of original federal question jurisdiction is to afford plaintiffs a sympathetic and knowledgeable forum for vindication of their Federal rights. *Hunter v. United Van Lines* 746 F.2d 635 C.A.9 (Cal.) 1984, *cert.den., Rec'd den.* 106 S.Ct. 180.

Verizon's District Court complaint alleged that the commission violated the act when it ordered payment to reciprocal compensation and sought a declaratory judgment that the commission's order was unlawful and an injunction prohibiting its enforcement.

In its *Verizon* determination, the Supreme Court held (App. page 61): "It is firmly established in our cases that the absence of valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction i.e. the court's statutory or constitutional power to adjudicate the case." *Steel Co. v Citizens for better Environment,* 528 U.S. 83-89 (1998).

> As we have said, the District Court has jurisdiction if the right of the petitioner to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another unless the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or when such a claim is wholly insubstantial and

> frivolous. Verizon's claim thus falls within 28 U.S.C. 1331's general grant of jurisdiction and contrary to the Fourth Circuit's conclusions nothing in 47 U.S.C. 252 (e) (6) purports to strip its jurisdiction. (App. page 61)

The Supreme Court used the words "precisely parallel." The identical matter is "precisely parallel" to the present case since Title 28 sections 2201 and 2202 does not purport to strip the District Court jurisdiction and in fact specifically grants jurisdiction.

The Supreme Court stated (Opinion page seven): "Indeed it (Section 252) does not even mention subject matter jurisdiction but reads like the conferral of a private cause of action (any party aggrieved by such determination may bring an action in an appropriate Federal District Court)." (App. page 62)

This is precisely parallel to Title 28 Sections 2201 and 2202 language stating "In the case of actual controversy within its jurisdiction– any court of the United States upon filing of an appropriate proceeding may declare the rights and legal relations of any party seeking such declaration." (App. page 62)

The Supreme Court stated (Opinion page eight) in regard to withdrawal of Section 1331 grant of jurisdiction: "We will not presume that the statute means what it neither says nor fairly implies 3." (App. page 63)

The numeral (3) refers to a footnote in which the Supreme Court made it perfectly clear that the Rooker-Feldman Doctrine "has no application to judicial review of executive action including determinations made by a state administrative agency." (App. page 63)

It is clear that the Erwin complaint alleges a Federal constitutional violation by the Oregon State Bar (a state agency).

It is clear that based upon the *Verizon* footnote that the reliance by the court of appeals and the District Court

decision relying on the Rooker-Feldman Doctrine was absolutely in error in the Erwin case.

Plaintiff's complaint sought a declaratory judgment as did Verizon's complaint and sought as "precisely parallel" to footnote three that the relationship between Plaintiff and defendants as to the Oregon State Bar Professional Liability Fund be terminated and abated, and no further assessments be levied or collected unless upon order of the District Court because of a determination that the Bar and its Board of Governors were in violation of the United States Constitution. (Plaintiff's Complaint prayer number 3) (App. page 30).

The Supreme Court in *Verizon* states: "*Verizon* may proceed against the individual commissioners in their official capacities pursuant to the doctrine of *ex parte Young*," 209 U.S.123(1908) and (Opinion page eight): (App. page 66)

> In determining whether the doctrine of *ex parte Young* avoids an eleventh Amendment Bar to suit, a court need only conduct a straight forward inquiry into whether the complaint alleges an ongoing violation of Federal Law and seeks relief properly characterized as prospective." *Idaho v. Coeur d'alene tribe of Idaho*; 521 U.S. 261-296 (1997). (App. page 63)

Note: To make a straight forward inquiry the federal District Court would of necessity have to hold a hearing which the Oregon Federal District Court refused to do.

The *Verizon* case held (Opinion page nine):

> The prayer for injunctive relief (that state officials be restrained from enforcing an order in contravening controlling Federal Law) clearly satisfies our 'straight forward inquiry' and 'indeed *ex parte Young* itself was a suit against state officials – to enjoin enforcement of a railroad commission's order requiring reduction in rates.' 209 U.S. at 129. (App. page 64)

Again referring to "Declaratory Relief" (Opinion page nine), the *Verizon* Court stated:

> As for *Verizon's* prayer for declaratory relief: that to be sure, seeks a declaration of the past as well as the future ineffectiveness of the commission's actions so that the past financial liability of private parties may be affected. But no past liability of the state or any of its commissioners is at issue.
>
> It does not impose upon the State a monetary loss resulting from a past breach of fiduciary duty on the part of the defendant state officials. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Insofar as exposure of the state is concerned, the prayer for declaratory relief adds nothing to the prayer for injunction.

Therefore, Plaintiff concludes that all three of the theories relied upon by both the Oregon District Court and the Ninth Circuit Court of Appeals for support of those decisions have been by virtue of the "precisely parallel" comparison of *Verizon* and its logical examination of the identical questions presented in this Erwin case been emasculated, and the Erwin case should be remanded (as was *Verizon*) with instructions to accept jurisdiction and to hold hearings in order to determine the proper applicability of existing law relating to the administration and validity of the Oregon State Professional Liability Fund.

Respectfully submitted,

Warde H. Erwin, pro per